Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1386

OHIO AFL-CIO, THE UNITED AUTOWORKERS OF OHIO AND IRA THOMPSON,

Petitioners,

v.

THE INSURANCE RATING BOARD, ET AL.,

Respondent.

BRIEF FOR RESPONDENTS, INSURANCE RATING BOARD AND UNITED STATES FIDELITY AND GUARANTY COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OHIO AFL-CIO, THE UNITED AUTOWORKERS OF OHIO and IRA THOMPSON,

Petitioners,

v.

THE INSURANCE RATING BOARD, UNITES STATES FIDELITY AND GUARANTY COMPANY and EUGENE BROWN,

Respondents.

BRIEF FOR RESPONDENTS, THE INSURANCE RATING BOARD AND UNITED STATES FIDELITY AND GUARANTY COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondents, The Insurance Rating Board and United States Fidelity and Guaranty Company, respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Opinions Below

The opinions of the United States Court of Appeals and of the United States District Court are correctly set forth in the appendices to the Petition. (Petition Appendix D, pp. 33 et seq.; Petition Appendix C, pp. 26 et seq.)

However, respondents will also hereafter refer to and attach as appendices to their brief the decision by the defendant (below) Superintendent of Insurance of the State of Ohio, dated May 12, 1967, reviewing, at the demand of petitioners, the automobile insurance rates filed by the predecessors* of the respondent Insurance Rating Board (Appendix 1, attached), as well as decisions and opinions, on appeal therefrom by petitioners, rendered by the Court of Common Pleas, Franklin County, Ohio on April 3, 1968 (Appendix 2, attached), the Court of Appeals of Franklin County, Ohio dated August 26, 1969 (Appendix 3, attached) and by the Supreme Court of the State of Ohio dated January 28, 1970 (Appendix 4, attached).

These demonstrate, we respectfully submit, in this very case, the absurdity of petitioners' contention that there is no "regulation" of the business of insurance in Ohio because regulation under the Ohio insurance statutes is allegedly "ineffective" and an alleged "pretense". (Petition, p. 7).

Even if it were properly arguable by them that the Ohio administrative and judicial decisions were erroneous and unjust (and from this they sought no review beyond the Supreme Court of Ohio) their own case demonstrates that they have had the use of and involvement in extensive regulatory procedure.

Jurisdiction

The respondents do not question the review jurisdiction of this court.

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* The original respondents, National Bureau of Casualty Underwriters and National Automobile Underwriters Association were consolidated into respondent, Insurance Rating Board, effective January 2, 1968 (Court of Appeals Appendix, 17a).

Questions Presented

Respondents submit that petitioners' statement of the "Questions Presented" is somewhat confusing, and complicated by argumentative reference to affidavit allegations attempting to discredit the quality or genuineness of the regulation of insurance in Ohio.

The courts below decided, on the complaint, to grant the motion of defendants to dismiss "on the ground that the court lacks jurisdiction over the subject matter of the action" (Petition, 26) by reason of the fact that "the business of insurance, including insurance rates, is regulated by Ohio law and is thus exempt from federal anti-trust laws by the McCarran Act, 15 U.S.C.A., §§1011 through 1015" (Petition, 27).

The sole "Question Presented" is that framed in the District Court opinion as follows (Petition, 28):

> "The issue before the Court is whether, assuming the factual allegations of the complaint to be true, Ohio 'regulates' the business of insurance within the meaning of the McCarran Act."

Statutes Involved

Petitioner's statement of the "Statutes Involved" is correct as far as it goes (except for typographical omission, from the quoted portion of the McCarran Act, of the reference to the Sherman Act as one of the statutes from which the business of insurance is exempted to the extent regulated by State law.)

However, it omits any reference to the extensive Ohio insurance regulatory statutes which are an important part of this case. This court may take judicial notice of the Ohio insurance statutes as did the courts below (Petition, 28-30; 39-41).

The Ohio insurance statutes are set forth in title 39, Chapters 3901 to 3999 of the Revised Code of Ohio. They were found by the Court of Appeals to constitute "a comprehensive scheme for regulating practically all aspects of the business of insurance as transacted in that state" (Petition, 39). They are summarized in the opinions below (Petition, 28-30; 39-41) and we feel need not be set forth in detail in this brief.

Statement of the Case

The petitioners' "Statement Of The Case" is argumentative and biased and to some extent inaccurate as, for example, the statement that "the Ohio insurance statutes are alleged to be a mere pretense and not regulation" (Petition, 5). The Court of Appeals expressly found that there was no such language in the complaint and that the conclusory allegations thereof as to non-regulation were "not only in conflict with the elaborate statutory scheme prescribed by Ohio law, but in any event are not sufficient on a motion to dismiss for failure to state a claim to develop a factual issue which the appellees are required to meet" (Petition, 44).

The respondents can present no better "Statement of the Case" than that set forth at the beginning of the Court of Appeals opinion. They therefore adopt it as their own for this brief and herein set it forth (Petition, 34-36, emphasis indicated is by the Court):

> "This is an antitrust action instituted by Ohio AFL-CIO, The United Autoworkers of Ohio, and Ira Thompson as a licensed automobile operator in Ohio carrying automobile liability insurance, against the Insurance Rating Board (IRB), one of its members, United States Fidelity and Guaranty Company (USF&G), and Eugene Brown, the Ohio Superintendent of Insurance, alleging violations of the Sher-

man Antitrust Act by a combination and conspiracy in the fixing of prices of automobile insurance premiums. It is alleged that rate increases were instituted by the IRB in Ohio in 1965, 1966 and 1968 on a statewide average for automobile liability insurance of 4.47%, 13.5% and for automobile liability and property damage of 7.9%, respectively, without any state regulation.

The complaint seeks injunctive relief against the charging of rates other than the rates made effective in November 1966, against the acceptance of any further filings for rate increases during the pendency of the action, and against any combination or conspiracy to restrain trade or to monopolize trade and commerce in violation of the Sherman Antitrust Act. There is also a claim for treble damages and other statutory benefits.

There are general allegations in the complaint to the effect that the IRB and its predecessors and its members and subscribers acting in concert with various departments of insurance among the several states have violated and are now violating the Sherman Antitrust Act by unlawfully contracting, combining and conspiring to restrain trade in inter-state commerce with respect to the business of automobile casualty insurance and by unlawfully contracting, combining and conspiring to control, regulate and dictate terms and fix the prices upon which automobile liability and collision insurance shall be sold throughout Ohio and other states.

It is alleged that the IRB is composed of 129 insurance companies which are members and subscribers, all of whom have started charging increased premiums approved by the IRB on July 10, 1968, for automobile insurance 'all without any state regulation to the detriment of the members of the Ohio AFL-CIO, the United Autoworkers of Ohio, Ira Thompson, and all others similarly situated.' It is further alleged that the insurance companies having membership in the IRB write approximately 17% of the automobile liability insurance in Ohio and approximately 22% of the

physical damage insurance in that state and 'through their rates and practices influence all automobile insurance rates charged throughout the state.' The complaint proceeds to allege further that under Ohio law, Revised Code Chapter 3937, the IRB, its members and affiliates and other insurance companies are permitted to set the effective date of any rate increases that they desire to institute; that such rate increases become effective immediately upon the date set by the said insurance companies; that such rate increases have never been challenged in the State of Ohio by the Department of Insurance or by any one except the plaintiffs; and that 'the Department does not even employ or have on its staff an actuary so as to be able to examine the rate filing.' *In essence the complaint is that there is an absence of state regulation in Ohio and that that state has abdicated its function of regulating the automobile insurance industry in favor of regulation by the automobile insurance industry itself.* The defendants, IRB, USF&G, and the Superintendent of Insurance, moved to dismiss the complaint on the ground of lack of jurisdiction of the Court because of the exemption of the business of insurance from the operation of the antitrust laws provided for by the McCarran Act, 15 U.S.C. Sec. 1011. In the alternative, they moved for dismissal of the complaint for failure to state a claim on which relief could be granted and for summary judgment on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

The district court in its opinion held that the Ohio statutory scheme for regulating the business of insurance *constituted regulation within the meaning of 15 U.S.C. Sec. 1012(b),* providing that the antitrust laws 'shall be applicable to the business of insurance to the extent that such business is not regulated by state law.' Answering the plaintiffs' argument that the Ohio scheme of regulation was not effective and therefore could not be deemed to constitute the kind of regulation contemplated

by the McCarran Act, the district court stated: 'A court is not empowered to make a policy judgment as to the type of regulation which is desirable. The Ohio legislature has adopted a statutory scheme which sets *standards* for insurance rates. This court is not concerned with the wisdom of the standards but with the limited question of whether or not the legislation is regulation under the McCarran Act.'

Citing *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560, 564, the court held that Ohio had provided general standards for the operation of the business of insurance and consequently that Ohio had 'regulated' the business of insurance within the meaning of the statutory exemption. Pursuant to this opinion the *court dismissed the complaint for lack of jurisdiction of the subject matter* without considering the alternative motion for summary judgment: On appeal, the principal issue before us is whether the district court was correct in its conclusion that Ohio regulated the business of automobile insurance so as to qualify for the McCarran Act exemption."

The Court of Appeals agreed with and affirmed the District Court holding that the business of insurance in Ohio is "regulated" within the meaning of the McCarran Act and is therefore not subject to the Federal antitrust laws.

Argument Opposing Writ

The decision of the Court of Appeals was right. It was in accord with the provisions of the McCarran Act and the accepted concept of insurance regulation contemplated thereby as recognized by this court, by Congress and by other well reasoned decisions throughout the country. The contentions of the petitioners are entirely unsupported by authority.

1.

As noted by the Court of Appeals (Petition, 33-35) the gravamen of the complaint is alleged combination and conspiracy to fix prices of automobile insurance premiums and to monopolize a part of the automobile insurance business in alleged violation of the Sherman Anti-trust Act (Complaint, par. 10, 13, 16; Petition, 19-22).

Ohio has comprehensively regulated the business of insurance and thus removed it from the operation of the Federal anti-trust laws as provided by the McCarran Act. Moreover, it has expressly regulated insurance in the very area complained of and, in the light of the historical development of insurance rating and the practical necessities of the business, has expressly authorized cooperative action among insurers and interchange of information among insurers and insurance supervisory officials.

Section 3937.17 of the Ohio Insurance Code provides:

> "Sections 3937.01 to 3937.17, inclusive, of the Revised Code shall be liberally interpreted to the end that insurance rates shall not be excessive, inadequate, or unfairly discriminatory, and *co-operative action among insurers in rate making* and in other matters within the scope of such sections *shall be authorized and regulated.* Such sections *do not prohibit* or discourage reasonable competition, or prohibit or encourage *uniformity in insurance rates,* rating systems, or rating plans or practices." (Emphasis added)

Section 3937.12 provides in part that:

> "The superintendent and every insurer and rating organization may exchange information and experience data with insurance supervisory officials, insurers, and rating organizations in other states and may consult with them with respect to rate making and the application of rating systems."

The Ohio statutes are typical, in this respect, of those passed in virtually every state following the McCarran Act. See Note, 47 Col. L. Review 1314 (1947).

This kind of state legislation expressly authorizing cooperative action in rate making, which might otherwise be prohibited by the Federal anti-trust laws, was contemplated by Congress when it enacted the McCarran Act and exempted insurance from the anti-trust laws to the extent that insurance is regulated by state law.

Congressional discussions so indicate. For example (91 Cong. Rec. 1471):

> "Mr. Pepper. * * * [I] am disturbed by * * * paragraph (b) of Section 2. * * * Does that mean that after June 30, 1948 the States may determine whether or not the Sherman and the other acts become applicable to the business of insurance?
>
> Mr. McCarran. The answer to that question is 'Yes'. During the 3 year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act, the Clayton Act, and the other acts. * * * "

The intent is further developed by the following (91 Cong. Rec. 1472):

> "Mr. Pepper. Does that mean that the States can by their own laws defeat the applicability and operation of the Sherman Anti-trust Act and the Clayton Act?
>
> Mr. O'Mahoney. I think the answer to that question will be clear when I point out that there are certain agreements which can normally be made in the insurance business which are in the public interest, but which might conceivably be a violation of the anti-trust law, which prohibits combinations and agreements in restraint of trade."

The following passage in the pre-McCarran Act congressional discussion seems to leave no doubt as to the congressional intent (91 Cong. Rec. 1551):

> "Mr. Ferguson. Under the language which is now in the bill as it appears in the conference report, *if a State passes an act regulating insurance or taxing insurance, and that regulation is contrary to the Sherman Act or the Clayton Act, with three exceptions, then the State law would be the law.*" (emphasis added)

In the case at bar Ohio has expressly legislated with respect to the matters complained of by the petitioners (alleged insurance price fixing combination). In doing so it has also enacted its own comprehensive statutory regulation of insurance rates. As the record shows this has actually been applied in the case of the petitioners (Appendices 1 to 4 attached).

What the petitioners really complain of is not lack of regulation but lack of satisfactory result in their resort to that regulation.

2.

The Court of Appeals was right in holding that, in view of Ohio's adoption of "a comprehensive scheme for the regulation of automobile liability and property damage insurance", summarized in three full pages of its opinion (Petition, 39-41), there is no substance to the contention of the petitioners that such regulation is not "effective" or to their gratuitous assertion (not alleged in the complaint, as the court noted) that it is "mere pretense".

The court also correctly found no support whatever for the contention of the petitioners that state regulation of insurance is not "regulation" within the meaning of the McCarran Act exemption unless the court, upon examination, finds that it was "effective" regulation.

Such a contention was unanimously rejected by this court in *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560, 564-565 (1958) in the following language:

> "Petitioner also argues in a different vein that even if the McCarran-Ferguson Act bars federal regulation where state regulation has been effectively applied, the exercise of Commission authority in these cases should be upheld because the States have not 'regulated' within the meaning of the section 2(b) proviso. This argument is not persuasive in the instant cases. Each State in question has enacted prohibitory regislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision. Petitioner does not argue that the statutory provisions here under review were mere pretense. Rather, it urges that a general prohibition designed to guarantee certain standards of conduct is too 'inchoate' to be 'regulation' until that prohibition has been crystallized into 'administrative elaboration of these standards and application in individual cases'. However, assuming there is some difference in the McCarran-Ferguson Act between 'legislation' and 'regulation', nothing in the language of that Act or its legislative history supports the distinctions drawn by petitioner. So far as we can determine from the records and arguments in these cases, the proviso in Section 2(b) has been satisfied."

Congress has so interpreted the *National Casualty* decision. See report of the Senate Sub-Committee on Anti-Trust and Monopoly, "The Insurance Industry—Aviation, Marine and State Regulation", Rep. No. 1834, 86th Cong., 2d Sess. (1960) at p. 5, which is quoted in the opinion of the Court of Appeals as follows (Pet., 43-44):

> "It now seems evident from this Supreme Court decision that the McCarran Act language, 'to the extent that such business is not regulated by State law,' restricts Federal authority regardless of whether the States are actively enforcing their regulations. If the States have enacted regulatory statutes, *capable of being enforced within their borders,*

> the Federal antitrust laws would apparently not apply. In such cases, no proof would apparently be entertained as to the extent to which the law had been administratively enforced. It also seems doubtful the Court would permit a questioning as to the equality of the State regulatory law." (Emphasis by Court)

This Sub-Committee report is a valid expression of Congressional intent and completely offsets and negatives any possible contrary fragmentary expressions of opinion by individual legislators, relied upon by petitioners (Petition, 9-11).

Moreover, the omission of Congress to make any change in the McCarran Act, following publication of the 1960 Sub-Committee Report referred to above, is an indication, we submit, of Congressional acquiescence in the views expressed in the report.

Other decisions throughout the country have, without exception, arrived at the same result.

In *Allstate Insurance Co.* v. *Lanier,* 242 F. Supp. 73 (E.D., N.C. 1965), aff'd. 361 F. 2d 870 (4th Cir. 1966); cert. denied 385 U.S. 930, the plaintiff in effect complained that North Carolina had not effectively regulated automobile insurance rates because, under its statute, plaintiff, an independent insurer, was compelled to join a state rating bureau and charge the same rates as other insurers, there being no provision for downward deviation, so that "individual companies are effectively precluded from competing through offering lower premium rates" (361 F. 2d at p. 871). Despite intervention by the Department of Justice which argued in substance that North Carolina rate regulation was inadequate to provide McCarran Act exemption from the anti-trust laws the court held that "this is not the form of competition which the plaintiffs prefer but it is the form of competition selected by the legislature of North Carolina as compatible with

the automobile liability insurance statutes of North Carolina" (242 F. Supp. at p. 89). In affirming, the U.S. Court of Appeals expressly held: "Whether the statutory plan embodies the wisest and most effective type of regulation is of course not a judicial question" (361 F. 2d at p. 873). As noted, this court denied certiorari.

Lynch v. *Insurance Rating Board* [U.S. District Court, Middle District of Tennessee, Nashville Division, Dec. 4, 1968, unreported—copy of opinion attached to this brief as Appendix 5] was a case in which the complaint was almost identical to that in the case at bar except that the Tennessee statute provided for prior approval of insurance rates. There the court rejected the plaintiff's argument that Tennessee's rate regulatory statute did not constitute "regulation" sufficient to qualify for McCarran Act anti-trust exemption because Tennessee (as is now claimed for Ohio) did not "effectively" regulate insurance (Appendix 5 attached, 20a-21a). The court cited this court's decision in *National Casualty* and also *Allstate Insurance Co.* v. *Lanier*. The court concluded (Appendix 5 attached, 21a):

> "With regard to plaintiff's argument that the Commissioner of Insurance and Banking is not properly evaluating rate filings of the IRB, it is sufficient to say that under Tennessee law the Commissioner is required to disapprove any rate filing when 'he determines, after due consideration, that such filing does not meet the requirements of this chapter.' T.C.A. § 56-603(c). If the Commissioner is not fulfilling his statutory duty, a remedy must be sought in state, not federal, court."

There is no merit to the argument of the petitioners that Ohio statutory automobile insurance rate regulation is ineffective or a "mere pretense" because rates become effective immediately upon filing instead of requiring prior review and approval by the Superintendent (Complaint, par. 18; Petition, 22). This so called "file and use" type

statute is a recognized form of state insurance rate regulation which has been adopted in many states, and by Congress itself for the District of Columbia [D.C. Code (1967 ed.) Sec. 35-1503(f) (casualty insurance)].

Equally fallacious is the argument that there is no "regulation" of the business of insurance in Ohio because the Ohio courts, interpreting Ohio administrative review statutes invoked by the petitioners, found that the petitioners (only one of them a policyholder*) were not entitled to review of the Superintendent's decision after hearing in their case or that, for other reasons, the rate regulatory statute was allegedly deficient procedurally (Petition, 4-6). Even assuming *arguendo* that the procedural criticisms of the petitioners were valid, the question is not "whether the statutory plan embodies the wisest and most effective type of regulation" (*Allstate Insurance Co.* v. *Lanier,* above, 361 F.2d at p. 873) but whether it constitutes "regulation" as contemplated by the McCarran Act anti-trust exemption.

We submit that the controlling principle is soundly expressed in the following passage in the opinion of the Court of Appeals (Petition, 42):

> "An ideal type of regulation may possibly envision the removal of the alleged deficiencies in the Ohio statutes referred to by the appellant. Yet the question before us is not whether the Ohio method of regulation compares favorably with the regulations of other states, or whether it is an ideal manner in which to regulate the business of insurance. We are confident that Congress in enacting the McCarran Act *did not intend to impose a uniform standard of regulation upon all of the states.* It is our view that the congressional intent was *to leave to the judgment*

* The plaintiff, Thompson, was one of 323,000 private passenger automobile policyholders to which the questioned automobile insurance rates of the respondent, Insurance Rating Board, applied. Some of them received rate reductions in the filings which Thompson challenged (Court of Appeals Appendix, 24a).

of each state the specifics of regulation which it should see fit to adopt. Suffice it to say at this point that we are confident that the comprehensive plan adopted by Ohio is fully adequate to meet the requirements of regulation contemplated by the McCarran Act." (Emphasis added.)

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

Decision of Superintendent of Insurance of State of Ohio, Dated May 12, 1967

STATE OF OHIO

DEPARTMENT OF INSURANCE

Hearing Before Director WILLIAM R. MORRIS

re

NATIONAL BUREAU OF CASUALTY UNDERWRITERS

AND

NATIONAL AUTOMOBILE UUDERWRITERS ASSOCIATION

Rate Revisions Effective November 30, 1966

This matter came on for hearing on February 14, 15 and 16, 1967 upon the applications of Ira C. Thompson and the Ohio AFL-CIO under Section 3937.04 (B), Ohio Revised Code. Those applications related to the automobile insurance rate revisions of the National Bureau of Casualty Underwriters and the National Automobile Underwriters Association which became effective November 30, 1966. The revisions pertained, respectively, to automobile liability insurance and automobile physical damage insurance rates for the member and subscriber companies of the National Bureau of Casualty Underwriters and the National Automobile Underwriters Association. The applicants alleged that such revised rates were excessive and unfairly discriminatory.

Chapter 3937 of the Ohio Revised Code provides that "Rates shall not be excessive, inadequate, or unfairly discriminatory." In determining whether the rates under consideration in the hearing meet the requirements of the Ohio regulatory law, the statute requires, and I gave consideration to, the following factors, based upon evidence

presented at the hearing and the very substantial volume of information and knowledge available to the Ohio Insurance Department:

a. Past and prospective loss experience in Ohio and elsewhere.

b. The experience or judgment, or both, of the ratemakers.

c. The experience of other ratemakers.

d. Normally contemplated physical hazards.

e. Catastrophe hazards.

f. A reasonable margin for *underwriting profit* and contingencies.

g. Dividends, savings, or unabsorbed premium deposits.

h. Past and prospective expenses.

i. All other relevant factors in Ohio and elsewhere.

The following general areas of testimony were offered by the applicants:

First, the applicants attempted to discredit insurance accounting practices used in preparing annual statements. Insurance accounting practices, while somewhat different from conventional accounting practices, have been uniformly required of insurance companies by state regulatory authorities for many years. Such practices are important for the purpose of evaluating the financial health of insurance companies. These practices have no relation to the ratemaking procedure. The applicants' testimony in this respect was immaterial to the issue of excessive or discriminatory rates. The applicants offered no substantial evidence to discredit the statistical and actuarial data used by the National Bureau of Casualty Underwriters and the

National Automobile Underwriters Association in the compilation of rates.

Second, the applicants proposed that investment income on unearned premium reserves and loss reserves be considered in the ratemaking procedure. This testimony was also immaterial to ratemaking. Inclusion of investment income from reserves in the ratemaking formula would be inconsistent with long-established and widely-accepted requirements among insurance regulators throughout the country. It would not only be inappropriate, but also beyond departmental authority, to compel that investment income from reserves be included in ratemaking. Insurers use investment income to meet the needs for insurance coverage by a growing population. Such needs have never been greater than at the present time.

Finally, much inference and innuendo was presented by the applicants to indicate that the rate revisions were excessive and unfairly discriminatory. This evidence was largely incomplete and inconsistent. Its import, therefore, is either "meaningless" or "misleading." Independent expert analysis of the hearing testimony submitted to me confirms the findings and conclusions reached by Department of Insurance rating technicians.

After careful consideration of all of the foregoing, I find that the automobile insurance rates which took effect for the National Bureau of Casualty Underwriters and the National Automobile Underwriters Association member and subscriber companies on November 30, 1966 are not excessive, inadequate or unfairly discriminatory, and that they, therefore, meet the statutory standards of the Ohio rate regulatory law. Accordingly, the applications of Ira C. Thompson and the AFL-CIO under Section 3937.04(B), ORC should be, and hereby are, dismissed.

WILLIAM R. MORRIS, Director
Ohio Department of Insurance

APPENDIX 2

No. 230,476

Decision of Court of Common Pleas, Franklin County, Ohio, rendered April 3, 1968
[Ohio AFL-CIO et al v. National Bureau of Casualty Underwriters, et al]

COURT OF COMMON PLEAS,

FRANKLIN COUNTY, OHIO

OHIO AFL-CIO, et al.,

Appellants,

against

NATIONAL BUREAU OF CASUALTY UNDERWRITERS, et al.,

Appellees.

Rendered this 3rd day of April, 1968.

STERN, *J.*

This is an appeal from a finding and order of the Director of Insurance, Ohio Department of Insurance (Director), dated May 12, 1967, which disallowed and dismissed the application of appellants objecting to the rate increase for automobile insurance put into effect by National Bureau of Casualty Underwriters (NBCU) and National Automobile Underwriters' Association (NAUA) on the date the said rates were filed, to-wit November 30, 1966.

Appellants assert that their appeal from the Director's finding and order is based upon the provisions of the Ohio Administrative Act (A.P.A.), (sections 119.01 et seq.,

and particularly section 119.12): That the appellees failed to file with this Court a complete record of the proceedings as required by section 119.12 R.C. In addition, appellants claim that in arriving at a conclusion in his finding and order, the Director considered evidence outside the record. Appellees contend that the appellants' appeal is not subject to A.P.A., and that the Director's decision is proper and lawful.

Briefly, the items presented to this Court are:

1) NBCU and NAUA, pursuant to the authority of section 3937.03 R.C., filed their rate revisions on November 30, 1966 with the Director. The Director found that the rate revisions filed with him complied with Chapter 3937 R.C. and that therefore they became effective on their filing.

2) Appellants requested a hearing on the filings and such hearing was held on February 14,-16, 1967.

3) On May 12, 1967, the Director issued his finding and order in deciding that the appellants' objections were not well taken.

Appellants contend that this appeal is authorized by section 119.12 R.C. as they are a party adversely affected by an order of the Director. In addition, appellants claim that the specific statutory authority for their appeal is based upon section 3901.041 R.C. as an "adjudication" of the Director's general power and duties, which are subject to review by an appeal perfected under A.P.A. (section 119.12 R.C.).

Appeals under A.P.A. (section 119.12 R.C.) are limited to findings and orders of an agency pursuant to "adjudication" under said sections, and that appeals can only be perfected by "any party adversely affected" by such finding and order.

Appendix 2

Section 119.01 R.C. defines "adjudication" as the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits or legal relationship of a *specified person.* "Party means a person whose *interests* are the subject of an adjudication by an agency. "Appeal" is designated as "the procedure by which a person aggrieved by a finding, decision, order or adjudication of an agency, invokes the jurisdiction of a court."

There are three ways to determine whether a state agency is subject to A.P.A.

1) The agency being specifically named. Section 119.01 R.C. does not name the Director as an agency.

2) The agency has authority to issue, suspend, remove or cancel licenses. The question of licenses of such is not the subject of the appeal before this Court.

3) The legislation concerning the agency specifically subjects the agency's findings and orders to A.P.A.

In the light of A.P.A. and the various applicable sections considered in the Insurance Code of Ohio (Title 39 R.C.) we have to determine first whether appellant is a person aggrieved by the Director's finding and order, which decision may be reviewed by the Court upon appeal.

Chapter 3937 R.C. provides that a casualty insurance company or rating bureau in filing any revision of insurance rates files such modification with the Director. The Director's sole function is to determine whether or not the rate filing complies with the statute. If it does, the rates become effective on the date of their filing. If it does not, the portions of the revisions which the Director finds do not comply, are no longer effective. In the consideration of the compliance by the Director of such rate modifications the solo and only parties in interest are the insurance company or rating bureau and the Director.

Appendix 2

An analysis of subdivisions (A) and (B) of section 3937.04 R.C. indicates that the hearing requested by a person or organization is limited by those directly affected by the Director's failure to determine that the modified rates as filed do not comply with the statutes. A person or organization whose interest is primarily that of a policy holder or representing a group of policy holders who are required to pay higher insurance rates is not a party to the filing of rates with the Director and therefore is not a "party" as designated in section 3937.15 R.C., which is the only section which directly refers to appeals from orders and decisions of the Director. The basis of all of the items referred to in this particular code section is postulated upon the opening words, "any insurer or rating organization aggrieved by any order, etc." The portion of the section which refers to orders and decisions which may be reviewed by the courts is limited to Chapter 3937 R.C. No where in Chapter 3937 is there any support for any theory that any person or organization or rating bureau has a right as a matter of law to be heard as to objecting to any insurance rates filed with the Director and even more so there is no provision in law for appeals to be perfected by persons or organizations other than casualty companies or rating bureaus. Section 3901.04 R.C. is not applicable to appeals from Chapter 3937 R.C. rate filings for the reason that the Director in acting upon rate filings has no authority in law to adjudicate such filings. His authority is limited solely to compliance or not compliance with Chapter 3937 R.C. In addition the appellate authority of Section 3901.041 R.C. in perfecting appellate proceedings by a person or organization is a general statement of appellate rights. The only possible appeal to Courts under rate modifications is found in Section 3937.15 R.C., and therefore the provisions of Section 3901.041 as to appellants' right of appeal from a decision made by the Director

is negated by Chapter 3937 R.C. Chapter 3937 is applicable only to appellants who have standing to appeal.

If we were to consider that Chapter 39 of the Revised Code pertained to appellants' position as a proper party under A.P.A., then such appeal would have to come under Section 3937.15 as a de novo appeal. If this be so, then appellants have not complied with the definition of a de novo appeal as defined in *Cupps vs. Toledo*, 172 O.S. 536 and *Fugate vs. City of Columbus*, 4 O.A. 2nd 147.

With reference to appellants' claim that the Director considered evidence outside the record, we must reject this contention for the basic reason that we have no transcript of proceedings and therefore have no way of determining what the evidence was and how germane it may be to a determination of the finding and order made by the Director.

The appeal taken by appellants is not authorized by statute and, therefore, appellants have no standing in law to appeal the finding and order made by the Director on May 12, 1967. Appeal dismissed. The decision of the Director, therefore, is *affirmed*.

LEONARD J. STERN, *Judge*

Appearances:

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APPENDIX 3

(Decision of Court of Appeals of Franklin County, Ohio Dated August 26, 1969 [Ohio AFL-CIO, et al v. National Bureau of Casualty Underwriters, et al])

IN THE

COURT OF APPEALS

OF FRANKLIN COUNTY, OHIO

No. 9196

OHIO AFL-CIO

and

IRA C. THOMPSON,

Appellants-Appellants,

against

NATIONAL BUREAU OF CASUALTY UNDERWRITERS

and

NATIONAL AUTOMOBILE UNDERWRITERS ASSOCIATION

and

DIRECTOR WILLIAM MORRIS,
Department of Insurance, State of Ohio,

and

DEPARTMENT OF INSURANCE, STATE OF OHIO,

Appellees-Appellees.

DECISION

Rendered on August 26, 1969

Appendix 3

Clayman, Jaffy & Taylor, Mr. David Clayman and Mr. Stewart R. Jaffy, 71 East State Street, Columbus, Ohio, For Appellants-Appellants.

Wright, Harlor, Morris, Arnold & Glander, Mr. Rudolph Janata and Mr. James H. Ledman, 37 West Broad Street, Columbus, Ohio, and

Watters & Donovan, Mr. John P. Walsh, of Counsel, 161 William Street, New York, New York 10038, For Appellees National Bureau of Casualty Underwriters and National Automobile Underwriters Association.

Mr. Paul W. Brown, Attorney General, Mr. Robert D. Zitko, Assistant, Statehouse Annex, Columbus, Ohio, For Appellees Director William Morris et al.

Per Curiam.

The single issue presented by this appeal is whether the finding and order of the Director of Insurance, Ohio Department of Insurance, dated May 12, 1967, which disallowed and dismissed the application of the appellants objecting to the rate increase for automobile insurance put into effect by National Bureau of Casualty Underwriters and National Automobile Underwriters Association on November 30, 1966, was appealable by such appellants to the Common Pleas Court of Franklin County, Ohio. That court, by entry of May 21, 1968, held that it was not, and dismissed the appeal.

It now appears from the oral arguments that the particular rates which were protested and objected to by the appellants have been supplanted by new rate filings, to which no objections were filed. Even if one were to assume that the order of the director was somehow appealable to the Common Pleas Court of Franklin County under some provision or provisions of Chapters 119., 2505., or 3937. of

the Revised Code, it is conceded by all concerned that no effectual judgment could be rendered to "roll the rates back" or to collect back, on behalf of any insured, any premium so paid while such protested rates were in effect.

Where a "decision cannot be made effectual by a judgment," the appeal should be dismissed as being moot. *Miner* v. *Witt* (1910), 82 Ohio St. 237.

This basic law, as announced by the Ohio Supreme Court in *Miner* v. *Witt*, has never been reversed or modified by that court but, instead, has been followed in many cases. See 3 Ohio Jurisprudence 2d 539, §603, Appellate Review, Moot Cause, and the cases cited thereunder.

Appeal dismissed.

DUFFY, P. J., LEACH and HOLMES, *JJ.*, Concur.

APPENDIX 4

(Order of Supreme Court of the State of Ohio, Dated January 28, 1970 [Ohio AFL-CIO, et al v. National Bureau of Casualty Underwriters, et al])

THE STATE OF OHIO

CITY OF COLUMBUS

No. 69-744

OHIO AFL-CIO et al.,

Appellants,

against

NATIONAL BUREAU OF CASUALTY UNDERWRITERS et al.,

Appellees.

APPEAL FROM THE COURT OF APPEALS

FOR FRANKLIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX 5

Opinion

of

U.S. District Court, Middle District of Tennessee, Nashville Division, Dated December 4, 1968

[Lynch v. Insurance Rating Board, et al.]

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

Civil No. 5205

MATT LYNCH, Individually and as President of the TENNESSEE STATE LABOR COUNCIL, AFL-CIO

against

INSURANCE RATING BOARD, Atlanta Division, and DAVID PACK, Commissioner of Insurance and Banking, for the State of Tennessee

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In this action, plaintiff Matt Lynch, as President of the Tennessee State Labor Council and as a policyholder of an insurance company member of the Insurance Rating Board filed this complaint, on behalf of himself and as a class action on behalf of other automobile insurance policyholders similarly situated, against the Insurance Rating Board, Atlanta Division, (IRB) as the official representative of its approximately 129 members and subscribers, and against David Pack, the current Commissioner of Insurance and Banking for the State of Tennessee, invoking the jurisdiction of the Court under 15 U.S.C.A. §26.

Appendix 5

Plaintiff's complaint charges a conspiracy among members and subscribers of the IRB to monopolize and restrain trade in commerce in violation of the Sherman Anti-Trust Act, 15 U.S.C.A. §§1, 2.

Plaintiff alleges that the members and subscribers of the IRB have violated the Sherman Anti-Trust Act (1) by unlawfully agreeing to sell automobile insurance policies at rates fixed by the IRB rather than on the basis of individual company capability; and (2) by unlawfully agreeing to set underwriting standards which have no reasonable relation to risk, but are based on geographic and artificial classifications specificially designed to discriminate against a designated segment of the community.

Plaintiff further alleges that the Commissioner of Insurance and Banking has failed to regulate effectively the insurance industry contrary to the provisions of 15 U.S.C.A. §1011:[1]

(1) By refusing to consider in the evaluation process the fact that insurance companies receive money in advance periods on which interest is earned, and not reflecting this fact in the computation of the rates to be charged;

(2) By refusing to consider in the evaluation process the fact that the IRB pools non-risk elements which are not uniform for all companies, thus enabling the IRB to establish rates weighted to protect the least efficient operator; and

(3) By refusing to consider in the evaluation process the fact that insurance companies profit by the delays in the overcrowded court dockets in that interest on money

[1] 15 U.S.C.A. §1011 "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

due a claimant after an accident, which accrues from the date of the accident is retained by the companies.

The relief sought from these alleged violations of the Sherman Anti-Trust Act is a preliminary and permanent injunction, enjoining defendants from further violations of the Sherman Anti-Trust Act and an award of treble damages.

The sufficiency of the complaint in this antitrust action has been attacked by both defendants by motions to dismiss under FRCP 12(b)(1) on the ground that the Court lacks jurisdiction over the subject matter; under FRCP 12(b)(6) on the ground that the complaint fails to state a claim upon which relief can be granted; and under FRCP 17(a) and 23(a) on the ground that plaintiff is not a real party in interest and lacks capacity and standing to maintain this suit.

In the alternative, each defendant moves for summary judgment pursuant to FRCP 56 on the ground that no genuine material issue of fact exists, and that the defendants are entitled to judgment as a matter of law.

On September 23, 1968, defendant IRB, an insurance rating organization licensed by the Tennessee Commissioner of Insurance and Banking, on behalf of its Tennessee members and subscribers, requested a rate increase of 15% in private passenger automobile liability and physical damage insurance rates.

On October 4, 1968, plaintiff filed his complaint in this action seeking among other things to have the Court enjoin defendant Pack from engaging in any activity, either active or passive, which would result in the rate increase requested by the IRB on September 23rd.

Under Tennessee law the Commissioner of Insurance and Banking is required to approve a rate filing before the requested rate increase may be put into effect. However, with one unrelated exception, any filing shall be deemed

approved unless disapproved within thirty days. T.C.A. §56-603(c).

When the present action was filed the Commissioner had neither approved nor disapproved the IRB's automobile insurance filing of September 23rd. The thirty day period for disapproving the rate filing expired on October 23, 1968. This factor caused defendant Pack to move the Court to set plaintiff's motion for a preliminary injunction for hearing. A hearing on plaintiff's motion for a preliminary injunction, together with defendant IRB's motion to dismiss and for summary judgment, was set for October 21, 1968.

On October 18, 1968, Commissioner Pack pursuant to T.C.A. §56-603(c) disapproved the IRB's rate filing of September 23, 1968, and requested the Governor to appoint a study committee to inquire into the rating practices of the IRB. Plaintiff then moved the Court for a voluntary dismissal pursuant to FRCP 23 and 41.

A hearing on all motions was held on October 21, 1968. All motions were taken under advisement pending submission of briefs to the Court on the issue of subject matter jurisdiction.

The jurisdictional issue before the Court is whether the business of insurance in Tennessee is subject to the proscriptions of the federal antitrust laws.

The pertinent federal statute, popularly known as the McCarran Act, provides that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act

> of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. 15 U.S.C.A. §1012(b).[2]

Thus it is clear that the business of insurance in Tennessee is not subject to the proscriptions of the federal antitrust laws to the extent that the insurance business in Tennessee is "regulated" within the meaning of §1012(b), by the laws of Tennessee.[3]

On the subject of what constitutes regulation within the meaning of §1012(b) the Federal District Court for the Northern District of California in *California League of Independent Insurance Producers* v. *Aetna Casualty & Surety Co.*, 175 F.Supp. 857, 860 (1959) said:

> This Court is of the opinion that a State regulates the business of insurance within the meaning of §1012(b) when a State statute generally proscribes (*F.T.C.* v. *National Cas. Co.*, 1958, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed. 2d 1540) or permits or authorizes certain conduct on the part of the insurance companies In *F.T.C.* v. *National Cas. Co., supra,* the Court held that there was State regulation within the meaning of §1012(b) when a State act generally prohibited "certain standards of conduct." 357 U.S. at

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[2] 15 U.S.C.A. §1012(a) provides that "The business of insurance, and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

[3] In enacting the McCarran Act "Congress' purpose was broadly to give support to existing and future state systems for regulating and taxing the business of insurance." Prudential Insurance Co. v. Benjaman, 328 U.S. 408, 429-30 (1946). To give specific effect to this policy Congress included §1012(b).

page 564, 78 S.Ct. at page 1262. From the above case it would seem to follow that if a state has generally authorized or permitted certain standards of conduct, it is regulating the business of insurance under the McCarran Act.

As a part of its statutory regulation of the insurance business Tennessee expressly requires that every insurer file with the Commissioner every rate and rating plan it proposes to use. T.C.A. §56-603(a).[4] No insurer can make or issue a contract or policy except in accordance with filings which have been approved for that insurer. T.C.A. §56-603(h).

The Commissioner of Insurance and Banking must approve or disapprove every filing, specifying, if he disapproves, in what respect the filing does not meet the statutory requirements. T.C.A. § 56-603(e). Each filing, with one unrelated exception, shall be deemed approved unless disapproved within thirty days.[5] T.C.A. § 56-603(c).

An insurer may satisfy its obligation to make rate filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings and by authorizing the Commissioner to accept such filings on its behalf. T.C.A. § 56-603(b).

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[4] The "Tennessee Insurance Law" is found under Title 56, Chapters 1 to 36, of the Tennessee Code Annotated. (T.C.A.). The Tennessee statutes regulating insurance rate making and rate making organizations are found in Chapter 6 of Title 56, T.C.A. §§56-601 through 615.

[5] If at any time the Commissioner finds that an approved filing no longer meets the requirements of this Chapter, he must, after notice and a hearing, issue an order withdrawing his approval thereof. T.C.A. § 56-603(f). Any person or organization aggrieved by the action of the Commissioner with respect to any filing may, within thirty days after such action, make written request to the Commissioner for a hearing thereon. T.C.A. § 56-603(h).

Thus cooperative action among insurers in rate making is expressly sanctioned by statutory provisions for the filing of rates through rating organizations. In addition, T.C.A. § 56-613(c) provides for cooperative rate making efforts as follows:

> In order to further uniform administration of rating laws, the Commissioner and every insurer and rating organization may exchange information and experience data with insurance supervisory officials, insurers and rating organizations in other states and may consult and cooperate with them with respect to rate making and the application of rating systems.

In addition to expressly sanctioning the use of rate making organizations, the Tennessee legislature has enacted legislation regulating rating organizations.

Rating organizations are required to be licensed by the State of Tennessee. T.C.A. § 56-604 outlines the procedure to be followed by the various rating organizations in applying for said license. Such a license is issued only after a finding by the Commissioner that "the applicant is qualified." In addition, rating organizations are required to be examined by the Commissioner or his appointee at the rating organization's expense at least once every five years. T.C.A. § 56-607.

In summary, the State of Tennessee has established standards which insurance rates must meet, and has authorized the enforcement of these standards through a scheme of administrative supervision. In addition, the State of Tennessee has authorized the filing of rates through rating organizations licensed and supervised by state officials. From what has been said it is clear to the Court that the laws of Tennessee "regulate" the business of insurance in Tennessee within the meaning of § 1012(b).

However, plaintiff contends that the federal antitrust laws are applicable to the business of insurance in Ten-

nessee because the Tennessee Commissioner of Insurance and Banking has failed to regulate "effectively" the insurance industry. He insists that the Commissioner, in evaluating rate filings of the IRB, has refused to consider certain factors which plaintiff apparently believes entitles the insured drivers in Tennessee to lower car insurance rates than those they are presently paying.

In effect what plaintiff is saying is that regulation within the meaning of § 1012(b) requires more than a statutory scheme of regulation. The thrust of this argument is that the Commissioner of Insurance and Banking has not effectively enforced the laws of Tennessee regulating the business of insurance.

The United States Supreme Court in disposing of a similar argument in *F.T.C.* v. *National Casualty Co.*, supra, said:

> This argument is not persuasive in the instant cases. Each State in question has enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision . . . . assuming there is some difference in the McCarran-Ferguson Act between "legislation" and "regulation," nothing in the language of that Act or its legislative history supports the distinctions drawn by petitioners. So far as we can determine from the records and arguments in these cases, the proviso in Section 2(b)[6] has been satisfied. 357 U.S. at 564-65.

Tennessee has enacted prohibitory legislation proscribing unfair, unreasonable, inadequate or unfairly discriminatory insurance rates and has authorized the enforcement of these requirements through a scheme of

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[6] 15 U.S.C.A. § 1012(b).

administrative supervision. T.C.A. § 56-602(4). Assuming, as the Supreme Court did in the *F.T.C.* case, that there is some difference in the McCarran Act between legislation and regulation, there is nothing in the language of the Act, nor has plaintiff directed the Court's attention to anything in the Act's legislative history, which supports plaintiff's argument that the statutory exemption does not apply when a state's scheme of regulation has not been effectively enforced. The Court, as above stated, is of the opinion that the business of insurance, insofar as rate making and rate making organizations are concerned, is "regulated" by Tennessee law within the meaning of § 1012(b)[7], and, that the federal antitrust laws, including the provisions of the Sherman Act relied upon by plaintiff, are inapplicable in this case.

With regard to plaintiff's argument that the Commissioner of Insurance and Banking is not properly evaluating rate filings of the IRB, it is sufficient to say that under Tennessee law the Commissioner is required to disapprove any rate filing when "he determines, after due consideration, that such filing does not meet the requirements of this chapter." T.C.A. § 56-603(c). If the Commissioner is not fulfilling his statutory duty, a remedy must be sought in state, not federal, court.

In conformity with this opinion judgment will be entered dismissing plaintiff's action for lack of jurisdiction of the subject matter and for failure of the complaint to state a claim upon which relief can be granted. It follows, in view of this disposition of the action, that the Court must deny the plaintiff's motion for a voluntary dismissal without prejudice. Since the Court concludes

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[7] Whether a state's statutory plan embodies the wisest and most effective type of regulation is not a judicial question. See *All-State Insurance Co.* v. *Lanier*, 242 F. Supp. 73 (E.D. N.C. 1965), aff'd. 361 F.2d 870 (4th Cir. 1966).

that plaintiff has no right to relief under the antitrust laws because of the exemption of the McCarran Act, such denial does not cause plaintiff to suffer the loss of a substantial right.

As the plaintiff's action must be dismissed for the reasons stated, the issue of standing need not be discussed.

WILLIAM E. MILLER
United States District Judge

Attest: A true copy
BRANDON LEWIS, Clerk
U. S. District Court
Middle District of Tennessee
By: L. M. EDWARDS, D.C.